Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-211 & 86-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANNA PICCININ and COMMITTEE OF REPRESENTATIVES OF DALKON SHIELD CLAIMANTS,
Petitioners,

v.

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

WILLIAM R. COGAR
Counsel of Record
CLIFFORD W. PERRIN, JR.
JAMES S. CROCKETT, JR.
LINDA J. THOMASON
MAYS & VALENTINE
P. O. Box 2426
Richmond, Virginia 23208
(804) 644-6011

MICHAEL L. COOK
DENNIS J. DREBSKY
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for A. H. Robins Company, Incorporated

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the District Court erred by enjoining, on the debtor's motion, an action by Petitioners against the debtor's co-defendant, when such action is found to affect the debtor's estate and to threaten the diversion of the debtor's key personnel from the reorganization effort.

2. Whether, pursuant to 28 U.S.C. § 157(b)(5), the District Court in a bankruptcy case may conditionally determine that a certain class of civil actions related to that Chapter 11 case will be tried in the district in which the Chapter 11 case is pending, subject to a subsequent final determination in each individual action if objection to venue is raised.

This Respondent is satisfied with the statement of Questions 2, 4 and 5 in No. 86-211.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. THE PRELIMINARY INJUNCTION	2
A. The District Court had jurisdiction to restrain Piccinin's action in the Middle District of Alabama	2
B. The Fourth Circuit's decision in *Piccinin* does not conflict with its prior decisions	5
II. THE VENUE ORDER	6
A. The Venue Order was required by the Bankruptcy Code	6
B. The Venue Order was not a final determination	6
C. *White Motor* is not inconsistent with the *Piccinin* opinion	8
D. Section 157(b)(5) is not unconstitutionally vague	10
E. The District Court may utilize 11 U.S.C. § 105 to effectuate its 28 U.S.C. § 157(b)(5) obligations	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

A. H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986) 1
In re A. J. Mackay Co., 50 B.R. 756 (D. Utah 1985) 6
In re Christy, 44 U.S. (3 How.) 292, 391 (1845) 4
In re White Motor Credit, 761 F.2d 270 (6th Cir. 1985) 8, 9, 10
Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 97 (1982) (White, J. dissenting) 4
Williford v. Armstrong World Industries, Inc., 715 F.2d 124 (4th Cir. 1983) 5, 6

STATUTES

11 U.S.C.
Section 105(a) 11
Section 105(c) 11
28 U.S.C.
Section 157(b)(5) ..... *passim*
Section 1334(b) 4, 5
Section 1391 10
Section 1412 11
Fed. R. Civ. P. 4(c)(2)(C)(i) 3
Va. Code § 8.01-288 3

OTHER AUTHORITIES

1 L. KING, COLLIER ON BANKRUPTCY, § 105.01, at 105-2 (15th ed. 1985) 11
15 A. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3806 (1976) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-211 & 86-216

ANNA PICCININ and COMMITTEE OF REPRESENTATIVES OF DALKON SHIELD CLAIMANTS,

Petitioners,

v.

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

Respondent A. H. Robins Company, Incorporated ("Robins"), respectfully submits this brief in opposition to the petitions for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986). For the reasons set forth below, the petitions should be denied.

STATEMENT OF THE CASE

While accepting Petitioners' statement of the case in No. 86-211, Robins wishes to emphasize that the judgment and opinion of the Fourth Circuit address two distinct orders of the United States District Court for the Eastern District of Virginia ("the District Court"). The

first was a preliminary injunction order entered on October 11, 1985 ("the Preliminary Injunction"), enjoining the continuation of actions involving the Dalkon Shield intrauterine contraceptive device that was manufactured and marketed by Robins. App. at A123-41.[1] The second order, entered November 9, 1985 ("the Venue Order"), contained the District Court's mandatory ruling pursuant to 28 U.S.C. § 157(b)(5) regarding venue for cases related to Robins' Chapter 11 case. App. at A142-45. In this order, the District Court ruled that all Dalkon Shield actions were related to the Chapter 11 case and the trial venue would be in the Eastern District of Virginia. On appeal, the Fourth Circuit remanded this order to the District Court with instructions to "make it crystal clear" that the order was conditional and that no case would be transferred to the Eastern District of Virginia without notice to the plaintiffs and their counsel and an opportunity to be heard on any objection to such transfer. App. at A101-02. Petitioner in No. 86-211 has asked this Court to review the Fourth Circuit's judgment and opinion with respect to both orders. Petitioner in 86-216 seeks review only of the Venue Order.

REASONS FOR DENYING THE WRIT

I. THE PRELIMINARY INJUNCTION

A. The District Court had jurisdiction to restrain Piccinin's action in the Middle District of Alabama.

Petitioner Anna Piccinin is a citizen of the United Kingdom residing in Rome, Italy. Pet. No. 86-211, inside front cover (unnumbered). Prior to the commencement of Robins' Chapter 11 case, Piccinin was the plaintiff in a civil action against Robins and the Aetna Casualty & Surety Company ("Aetna") pending in the United States

---

[1] All citations to the appendix refer to the appendix filed in No. 86-211.

District Court for the Middle District of Alabama ("the Alabama Action"). *Id.* at 2-4. Because Piccinin moved to continue the Alabama Action against Aetna after the Chapter 11 case was filed, Robins included her case with seven others in an adversary proceeding commenced in the Chapter 11 case, seeking a preliminary injunction against continued prosecution of the action. *A.H. Robins Co. v. Campbell, et al.*, No. 85-1006-R (Bankr. E.D. Va.) ("the Campbell Adversary Proceedings"). On September 25, 1985, Robins mailed, by first class mail, a copy of the summons, complaint, and all supporting documents in the Campbell Adversary Proceeding to her counsel in the Alabama Action and to Piccinin at her address in Rome, Italy. She admits that these papers were received. Pet. No. 86-211 at 5.

Piccinin's claim that the District Court lacked *in personam* jurisdiction over her is facially flawed. First, although Piccinin cites Robins' failure to obtain a delivery receipt for the papers mailed to her as a failure to conform to Rule 4(e) of the Federal Rules of Civil Procedure, any such defect does not defeat the validity of service under Virginia law, which also was available to Robins in the District Court. Fed. R. Civ. P. 4(c)(2)(C)(i). No form of service is defective under the law of Virginia if it is actually received by the defendant in time. Va. Code § 8.01-288.

Similarly, Piccinin's assertion that the District Court lacked jurisdiction over her person because of alleged insufficient contacts with the state of Virginia misperceives which contacts are relevant for purposes of bankruptcy jurisdiction. When a debtor commences an action under Title 11 of United States Code (the "Bankruptcy Code"), the immediate effect of filing the petition is the transfer of all claims arising in or relating to that bankruptcy case to the bankruptcy court.

> Sound policy . . . and a just regard to public as well as private interests, manifestly dictated to Con-

> gress the propriety of vesting in the District Court full and complete jurisdiction over all cases arising, or acts done, or matters involved, in the due administration and final settlement of the bankrupt's estate.

In re Christy, 44 U.S. (3 How.) 292, 391 (1845). The *in rem* nature of the bankruptcy system continues under the Bankruptcy Code, bolstered by enhanced *in personam* jurisdiction. *See Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 97 (1982) (White, J., dissenting). By operation of 28 U.S.C. § 1334(b), the District Court had jurisdiction over all actions "related to" Robins' Chapter 11 case.

At the time the Campbell Adversary Proceeding was filed, Piccinin was the plaintiff in a civil action against Robins and was attempting to continue that action against Aetna, Robins' co-defendant. Robins alleged and, upon the evidence presented, the District Court agreed that the Alabama Action threatened the administration of the Chapter 11 case pending in its court.[2] Thus, the impact of the Alabama Action on the Chapter 11 case gave the District Court jurisdiction to enter orders including the Preliminary Injunction, affecting that civil action. Any contrary result not only would violate the

---

[2] Piccinin asserts in her first question presented that the District Court made "no evidentiary findings in the bankruptcy proceeding that [her] action against Aetna threaten[ed] property of Robins' bankruptcy estate." Pet. No. 86-211, second page (unnumbered). To the contrary, the District Court heard evidence, including testimony from Robins' General Counsel, establishing the financial burden on Robins of continued defense of Dalkon Shield litigation. After hearing this evidence, the District Court specifically found that continuation of litigation against Robins' co-defendants, such as Aetna, (1) threatened property of Robins' estate, (2) burdened and impeded Robins' reorganization effort, and (3) contravened the public interest. App. at A119-21, A124-27, A134. The District Court also found that all remaining available proceeds of Robins' liability insurance coverage are property of Robins' Chapter 11 estate. *Id.* at A136.

letter and spirit of section 1334 but also would render impossible the administration of any bankruptcy case involving out-of-state creditors.

B. The Fourth Circuit's decision in *Piccinin* does not conflict with its prior decisions.

Piccinin argues that a writ of certiorari should issue to allow this Court to resolve a division of authority *within* the Fourth Circuit. No such division, however, exists. Piccinin wrongly contends that *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124 (4th Cir. 1983), bars the District Court from enjoining the continuation of civil actions against the debtor's co-defendants, such as Aetna. *Williford* involved an attempt by the non-debtor co-defendant to invoke the automatic stay for its benefit. *Id.* at 126. In the instant action, however, the debtor sought the injunction for its benefit. Robins sought to enjoin the Alabama Action to protect its Chapter 11 estate, not to protect Aetna. The District Court enjoined the Alabama Action because the evidence presented demonstrated that Robins' estate could be harmed by the possible creation of contribution or indemnity claims against Robins.[3] Moreover, the District Court specifically found that the continuation of the Piccinin action would divert the attention of key Robins personnel from the task of formulating a plan of reorganization. App. at 120-21. Nowhere did the District

---

[3] In support of her argument that continuation of the Alabama Action will not affect Robins' insurance or any other asset of its estate, Piccinin states that she has not filed a claim against Robins in the Chapter 11 case. Pet. No. 86-211 at 41. Although Piccinin may not have filed a claim, Aetna filed a $57 million claim for contribution against Robins based almost entirely on its potential liability in actions such as Piccinin's Alabama Action. Potential contribution and indemnity claims by co-defendants like Aetna, in addition to the immediate burden on Robins' employees and financial resources, were and remain the reasons necessitating the Preliminary Injunction. *See* n.2 *supra*.

Court cite any harm to Aetna as a basis for the Preliminary Injunction.

The alleged conflict between the District Court's ruling and *Williford* was squarely placed before the Fourth Circuit in the initial argument and was highlighted in the subsequent petition for rehearing.[4] In both instances, the Court of Appeals found no such conflict.

II. THE VENUE ORDER

A. The Venue Order was required by the Bankruptcy Code.

Petitioners cannot and do not question the District Court's authority to fix venue for all Dalkon Shield cases. Indeed, it was obligated to make this determination. Section 157(b)(5), states:

> The district court *shall* order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5) (emphasis added). Thus, although section 157(b)(5) gives the court a choice between two districts for trial venue, the determination of trial venue by the court in the bankruptcy case is mandatory.

B. The Venue Order was not a final determination.

The effort to seek review of the Fourth Circuit's decision with respect to the Venue Order is premature. The

---

[4] Piccinin also contends that the Fourth Circuit's decision conflicts with the unreviewed District Court's opinion in *In re A.J. Mackay Co.*, 50 B.R. 756 (D. Utah 1985). Pet. No. 86-211 at 42-45. *Mackay*, however, involved a stay of co-defendant litigation after plan confirmation. The court "[did] not hold that, in extraordinary cases, a non-bankrupt co-debtor cannot be protected prior to confirmation of a plan." 50 B.R. at 762. In fact, it recognized that such a stay may be necessary to protect the debtor. *Id.*

District Court's decision to determine trial venue for all pending Dalkon Shield actions against Robins was not a final determination but rather was

> conditional, dependent finally and ultimately upon a ruling to be made only after notice to all claimants advising them of their right to enter any objections they may have to such tentative ruling and to submit a motion for extension in their particular case.

App. at A101-02. The Venue Order, therefore, merely establishes the procedure for the mandatory determination of the trial venue for these cases, while reserving the court's power to abstain from hearing or to remand any particular proceeding. As the Fourth Circuit Court of Appeals' opinion made clear, rights of the Dalkon Shield claimants ("Claimants") are preserved.

> [D]ue process requires some form of notice and opportunity for a hearing before there can be a change of venue and before trial of a personal injury tort cause of action against a debtor may be transferred *finally* from the court in which the cause was initially filed to the district where the bankruptcy proceedings are pending.

App. at A96 (emphasis in original).[5]

The Claimants Committee asks this Court to exercise its power of review to "correct the grave errors below and to prevent their replication in other mass tort bankruptcies." Pet. No. 86-216 at 13. The Claimants Com-

---

[5] To avoid any misunderstanding on this point, the Fourth Circuit issued the following admonition:

> Until the conditional order is made final with regard to a particular case, the case should not be physically transferred. Thus, no filing fee shall be paid under Rule 9027 or expenditures accompanying photocopying, freight, etc. be made. Only after an order is final shall the expense of transfer be necessary.

App. at A102, fn. 18. Thus, the terms of the Fourth Circuit's opinion prohibit Robins from removing and physically transferring any case until the venue determination is final as to that case.

mittee thus implies that a grave error below has resulted in prejudice to a Claimant's right to a jury trial. As explained above, however, the Venue Order does not prejudice the right of any Claimant to petition for an alternative venue determination.

Because the Venue Order was not a final determination, it is not an appropriate matter for a writ of certiorari. Instead of reviewing a conditional order, this Court and the court of appeals should examine only final venue determinations in discreet cases in which objection to transfer is taken. Review at that time will be ordered by a factual record that permits a reasoned consideration of the factors affecting the District Court's election in that case.

C. *White Motor* is not inconsistent with the *Piccinin* Opinion.

The Claimants Committee argues that section 157(b)(5) was not intended to centralize cases, but was intended to decentralize claims. Pet. No. 86-216 at 7-8. In support of this argument, the Claimants Committee cites *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985). Not only is this argument misplaced because no final decision has been made, this argument wrongly interprets Congress' intention in enacting section 157(b)(5). In addressing this point, the Fourth Circuit stated as follows:

> [The Claimants Committee and Piccinin] refer to the language of Senator Dole in commenting on the Senate Conference Report on the 1984 amendments and to construe it as suggesting that tort claims were to be tried in the court in which those claims were originally filed. Senator Dole, in the language to which appellants refer and out of which the appellants arrive at their finding of the sense of the Congress, actually restated simply the language of the statute itself. He said that 'where abstention does not occur, those cases [i.e., "personal injury

> cases"] will be handled by the district court where the bankruptcy has been filed or, if the court finds it appropriate, where the claim arose.' Statement of Hon. Robert Dole 130 Cong. Rec. S8889 (Daily Ed. June 29, 1984), *reprinted in*, 1984 U.S. Code Cong. & Ad. News 586, 587. *We discern nothing in that language to warrant the conclusion that, in enacting the statute the Congress favored decentralizing the administration of the bankruptcy by leaving all 'personal injury cases' to the court in the place where the claim 'arose.'* In fact, to accept the view of the Appellants on the construction of the statute would be completely at variance with the House version of the bill, which was in effect accepted by the Conference Committee, and would be to adopt the Senate version, which, according to Congressman Kastenmeier's statement as a House Conference member, was 'largely reject[ed]' by the Conference Committee and *'would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case.'*

App. at A74-75 (footnotes omitted) (emphasis added).

The Fourth Circuit also recognized that *White Motor* was not inconsistent with the result reached in *Piccinin.*

> The extent of the holding in *White Motor* was that the district court had the power under the statute to allow products liability cases to be tried where the claim arose; *there was nothing in the opinion, however, that declared that such action was mandated or even preferred.* Specifically, there was no statement in the opinion that the district court in which the bankruptcy was pending could not try the claim. Unquestionably the district court in this case has the power under the statute to fix the trial venue in its district for all the Dalkon Sheild cases.

Id. at A75-76 (emphasis added).

White Motor simply does not hold that a district court must abstain from hearing tort claims based upon state

law. Rather, the court in *White Motor* only affirmed the lower court's decision to abstain, allowing the tort cases to remain in the state courts. *White Motor*, 761 F.2d at 273. Moreover, the *White Motor* court itself observed that district courts should be given "wide latitude in referring [tort] cases through abstentions to other courts." Id. at 274. Accordingly, the same latitude must be given to a district court's decision not to abstain but to try the claims itself.

D. Section 157(b)(5) is not unconstitutionally vague.

Among Piccinin's challenges to the Fourth Circuit's decision is the contention that section 157(b)(5) is unconstitutionally vague. Much to the contrary, this provision is clear and unequivocal. As previously noted, the District Court must determine trial venue from two permissible choices. The available options are described with precision. The District Court must determine trial venue to be either the district in which the Chapter 11 case is pending—the identity of that district certainly is obvious—or the district in which the claim arose.[6]

The phrase "in which the claim arose" is not vague. Instead, it is a well recognized term of art in federal venue statutes supported by a wealth of judicial interpretation. *See* 28 U.S.C. § 1391; *see generally*, 15 A. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE, § 3806 (1976).

---

[6] Section 157(b)(5) clearly eliminates any chance of Piccinin's claim being tried in the Middle District of Alabama. Because Piccinin's entire experience with the Dalkon Shield occurred outside the United States, her claim could not possibly have arisen in Alabama. Section 157(b)(5) permits the District Court the choice of ordering that any trial of a claim related to the Chapter 11 case be held in Richmond (where it presently is pending) or to transfer the claim out of Richmond to the district in which it arose. As Piccinin's claim arose in no federal district, any trial of her claim must be in Richmond.

E. The District Court may utilize 11 U.S.C. § 105 to effectuate its 28 U.S.C. § 157(b)(5) obligations.

Piccinin argues that 11 U.S.C. § 105(a) cannot be employed to effectuate the trial venue determination pursuant to 28 U.S.C. § 157(b)(5). Pet. No. 86-211 at 37-39. Noting that section 105(a) permits the court to enter "any order . . . necessary or appropriate to carry out the provisions of *this* title," 11 U.S.C. § 105(a) (emphasis added), Piccinin suggests that it could not be invoked in this instance because section 157(b)(5) appears in Title 28. Section 105(c), however, states that "[t]he ability of any district judge . . . to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge . . . set forth in Title 28." Thus, the district court's obligation under 28 U.S.C. § 157(b)(5) is expressly incorporated into section 105.

Placing the district court's duty to determine trial venue in bankruptcy cases along with the other provisions generally relating to courts and judges simply reflects an organizational decision by Congress. *See* 1 L. KING, COLLIER ON BANKRUPTCY § 105.01, at 105-2 (15th ed. 1985). Section 105(c) was added by the 1984 amendments to clarify that section 105 applied equally to bankruptcy judges and district judges sitting in Title 11 cases. *Id.* Thus, section 105 does not limit the District Court's authority but enhances it.

Finally, Piccinin argues that section 105 cannot be invoked by the District Court because such transfers of venue are governed by 28 U.S.C. § 1412. Even if correct, this argument is insubstantial and does not justify issuance of a writ of certiorari. The argument, however, is not correct. Section 1412 governs the transfer of bankruptcy cases under Title 11; section 157(b)(5) governs the determination of venue for all personal injury claims,

including those such as Piccinin's that are related to a Chapter 11 case.

CONCLUSION

The Preliminary Injunction Order and the Venue Order do not present appropriate issues for this Court's review by writ of certiorari. The two orders are within the District Court's authority, were issued after applying the proper legal standards and were based upon findings supported by the evidentiary record. Furthermore, the Venue Order was not a final determination, in review by this Court would be premature. Therefore, this Court should deny Petitioners' petitions and refuse to issue a writ of certiorari.

Respectfully submitted,

WILLIAM R. COGAR
Counsel of Record
CLIFFORD W. PERRIN, JR.
JAMES S. CROCKETT, JR.
LINDA J. THOMASON
MAYS & VALENTINE
P. O. Box 2426
Richmond, Virginia 23208
(804) 644-6011

MICHAEL L. COOK
DENNIS J. DREBSKY
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for A. H. Robins Company, Incorporated